CASE OF SALVADOR CHIRIBOGA V. ECUADOR
JUDGMENT ON THE PRELIMINARY OBJECTION AND MERITS

CONCURRING OPINION
OF JUDGE MANUEL E. VENTURA ROBLES

I have concurred with my vote to the adoption of the Judgment on the Preliminary Objection and Merits in the case of Salvador Chiriboga v. Ecuador, but I would prefer that the concept of “fair balance between the general interest and the interest of the individual” to have been conceptually developed.

When considering the issue of the restrictions to the right to property in a democratic society, the Court should have analyzed not only the criteria of public use or social interest, as well as the payment of a fair compensation, but also the criteria of “fair balance between a general interest and the interest of the individual" at the time of determining the validity of a condemnation, such as in this case, in light of Article 21(2) of the American Convention on Human Rights. The Judgment makes a briefly reference to said subject in paragraphs 63, 96 and 98.

The need to broadly develop the concept of "fair balance between the general interest and the individual interest", is useful for the determination of a violation of the right to property, resulting from the lack of proportionality of the means used by the state to restrict such rights, as well as for the appraisal of a fair compensation in the specific case, taking into account the particular circumstances of the case and, to such end, the concept of "fair balance" is essential. In my opinion, the following development of said concept of fair balance should have been included in the text of the Judgment delivered by the Court in the instant case:

Fair balance between the general interest and the individual interest

The Commission as well as the representatives agree on pointing out that the deprivation to which Salvador Chiriboga siblings were subjected was totally out of proportion regarding the intended purpose, considering that they even had to bear and are still bearing an excessive burden, as a result of all the taxes incorrectly paid by Mrs. Salvador Chiriboga.

Moreover, the State established that the procedures conducted in order to expropriate the property of Mrs. Salvador Chiriboga, were carried out in good faith. Furthermore, it pointed out the respect for the right to property is guaranteed in a democratic society as long as in such society, the right is exercised according to the limits established by law; and this situation, the State understands, is proven in this case given the fact that the condemnation of the property of the alleged victim is framed within the consideration of certain areas of ecological protection, in order to compensate the shortage of green areas in the City of Quito. This reason, at the discretion of the State, can be considered as a justification even bigger than the limit to the right to property. Furthermore, the State acknowledged the mistake committed in the incorrect collection of taxes from and the penalties imposed on Mrs. Salvador Chiriboga.

The Court wishes to repeat that when an State invokes reasons of general interest or public welfare to limit the human rights, those reasons will be subjected to an interpretation strictly limited to “just demands” of a “democratic society" that takes into account the balance between the different interests at stake and the needs of preserving the purpose and end of the Convention. The Court considers that the authority of the State to limit the right to property requires balancing between the general interest and the interest of the individual. Therefore, the State should use all the less costly means to damage the least the right of a person.

Accordingly, Article 21 of the Convention refers to the payment of a just compensation, which, according to this Tribunal, must be adequate, prompt and effective, since the compensation is one of the measures through which the State can comply with the goal of achieving a fair balance between the general interest and the individual interest. In such sense, the Court considers that in order to analyze the combination of a fair balance in the instant case, it is necessary to note whether there has been a just compensation, as well as other relevant factors such as the passage of excessive terms, out of proportions burdens or situations of uncertainty regarding the rights of the owner, that infringe the fair balance that Article 21 tries to protect, as well as the purpose and end of the Convention.

The European Court has also pointed out that the principle of fair balance implies that no all deprivation is, in principle, legal due to social or public interest.[1] All limitation, necessarily, must entail a reasonable relation of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures designed to control the use of the individual's property.[2] Said principle consists in the balance that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.[3]

Moreover, the Court has pointed out in previous cases, that there is a need of looking behind the mere appearances, in order to ascertain the real situation behind the reported situation.[4] In this sense, the European Corut, in relation to the scopes and effects that the limit to the right to property may have in a certain situation, has pointed out "[w]henever there is no formal expropriation, that is to say, no ownership of the land in question has been transferred, the Court considers that it has to look behind the appearances and investigate the realities of the situation, […].[5]

Furthermore, upon application of the principle of fair balance, the European Court has recognized that long periods of uncertainty to which people in condemnation proceedings have been subjected aggravate the

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1 *Cf.* ECHR, *James v UK,* Judgment of February 1985, Application no. 8793/79, para. 46.

2 *Cf.* ECHR, *Case Hutten-Czapska v. Poland*, Judgment of 22 February 2005, Application no. 35014/97, para. 93.

3 *Cf.* ECHR, *Case Hutten-Czapska*, *supra* nota **, para. 93; ECHR, *Case Matos e Silva, Ltda.,and others v. Portugal*, Judgment of 27 August 1996, Application no. 15777/89, para. 86; y ECHR, *Case Sporrong and Lönnroth V. Sweden*, Judgment of 22 September 1982, Applications nos. 7151/75; 7152/75, para. 69.

4 *Cf. Case of Ivcher Bronstein V. Perú*. Judgment of February 6, 2001. Series C No. 74, para. 124. See also: ECHR, *Case Belvedere Alberghiera S.R.L., supra* note **, para. 53. ECHR, *Case Papamichalopoulos and others V. Greece*, Judgment of 24 January 1993, Application no. 14556/89, para. 42; and ECHR, *Case Sporrong and Lönnroth*, *supra* nota **, para. 63.

5 Cf. ECHR, Case Sporrong and Lönnroth, supra note **, para. 63; ECHR, *Case of* Papamichalopoulos and others, supra note **, para. 42.

effects of the adopted measures, imposing an excessive burden that breaks the fair balance[6].

In the case at hand, the Inter-American Court notes that the State initiated several lawsuits that deprived Mrs. Salvador Chiriboga of her property and did not comply with the terms prescribed by law during their processing. In this sense, as article 8(1) of the Convention has already been analyzed with regard to the condemnation proceedings, this Tribunal considered that the State has not acted with due diligence, since the process has been delayed for more than a decade, and the fore, up to the moment, the State has not defined whether the expropriation is legal and the fair price as compensation.

Moreover, this Tribunal considers that the State did not use the reasonable and necessary means to find a fair balance between the general interest and the interest of the individual. Besides, as a result of the excessive time passed to conduct the expropriation, the State deprived Mrs. María Salvador Chiriboga of the right to enjoy the property for an indefinite time, situation which has been disproportionate and has subjected her to be in a legal uncertainty and violated her rights in an unreasonable manner.

Furthermore, the Court notes that Mrs. Salvador Chiriboga had incorrectly paid taxes and penalties, during the years 1991 and 2007.[7] In this sense, this Tribunal has determined, in specific situations, the existence of charges that are especially costly to the wealth of a person,[8] which violated the legal content of Article 21 of the Convention. At the discretion of the Court, in the instant case, the payment of taxes and penalties evidence the imposition of additional charges and punishments, which are considered excessive and disproportionate for Mrs. Salvador Chiriboga. The Court understand that such charges must be fully and effectively reimbursed to the victim and that the State shall guarantee that such abuses will not happen again.

As to the argument raised by the State regarding that, in the instant case, certain greater limits to the right of property can be justified, this Tribunal considers that the standard required by the Convention to limit the right to property is clear and therefore, it is not a justifiable situation to let the victims, as in the case at hand, Mrs. Salvador Chiriboga in a state of uncertainty due to non-compliance with the reasonable term in the already mentioned procedures and the denial of justice, combined with the fact of establishing additional and excessive burdens.

In this sense, the Court concludes that the State did not use the necessary means to obtain a fair balance between the interest at stake.

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[6] *Cf.* ECHR, *Case Matos e Silva, Ltda., and others*, *supra* note **, para. 92; ECHR, *Case of Beyeler*, (application no. 33202/96), January 5, 2000. Para.122, *Case of Sporrong and Lönnroth Vs. Sweden*, *supra* note **, para. 72 and 73; and ECHR, *Case of Jahn and Others v. Germany*, Judgment of 30 June 2005, Applications nos. 46720/99, 72203/01 and 72552/01, para. 93. For example, in the *Case of* Jahn et al v. Germany, the European Court determined that the total lack of compensation when the State acquires the property, violates the fair balance and imposes an unjust burden.

[7] At the public hearing, Mrs. Salvador Chiriboga stated that she paid all the taxes up to the date of her statement and has been doing it "for fear of a seizure if she did not pay". Spite of the payment of taxes, she has not been able to use the property. Even further, the expert witness Edgar Neira Orellana stated that the surcharge on non-serviced building areas is pointless to collect over those properties located in rural areas, for agriculture use; it has sense when the real estate is located within the urban parameters and punishes the lack of building or fosters the building within certain Municipality.

[8] Cf. *Case of Chaparro Álvarez and Lapo Íñiguez*, supra note **, para. 200 a 218.

Manuel E. Ventura Robles
Judge